MY PLACE OR YOURS: COPYRIGHT, PLACE-SHIFTING, & THE SLINGBOX:
A Legislative Proposal

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INTRODUCTION

Over the years, copyright law has repeatedly evolved with

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the technological advancements of the times.[1] Today, some of the greatest issues in copyright involve place-shifting technologies. Such technologies have spawned the creation of products like Sling Media's Slingbox, which uses place-shifting to retransmit cable broadcasts from the home receiver to a personal computer anywhere in the world.[2]

Absent legislation or a court ruling on place-shifting, the use of the Slingbox to retransmit any television broadcast will arguable deprive copyright proprietors of royalties for their copyrighted works under the compulsory licensing program.[3] Copyright law should be amended in order to protect copyright proprietors and maintain incentives for authors and inventors to continue to create original works.

Congress has considered several bills aimed at controlling new technological devices, such as the Digital Transition Content Security Act, which seek to protect copyright proprietors from infringements caused by place-shifting devices like the Slingbox.[4] However, many of these bills attempt to prohibit place-shifting completely.[5] While this prohibition would protect copyright proprietors, it would also limit incentives to continue to create new technologies. Banning advanced technologies would likely have the unintended effect of preventing inventors from furthering their discoveries for fear of copyright infringement liabilities.

Copyright law should be amended to assist copyright proprietors in both areas of protection and progress. In order to properly evaluate alternative legislation that better balances these elements, we must first examine copyright law and its growth over time, as well as past decisions applicable to devices like the Slingbox. With that understanding, the legislation proposed here would be an effective way to balance the needs of the system.

Part I will describe the workings of Sling Media's Slingbox and its appeal to consumers and explain the place-shifting technology that makes the Slingbox capable of retransmitting cable broadcasts. Part II discusses copyright law and the

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1. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).
2. Sling Media, Slingbox: How it Works, http://www.slingmedia.com/slingbox/how.php (last visited Oct. 22, 2005).
3. 17 U.S.C. § 111 (2005).
4. *See infra* notes 130 and 131.
5. *Id.*

exclusive rights granted to copyright proprietors.[6] This section will also review elements of contributory infringement and their application to devices like the Slingbox, while also examining case law regarding copyright infringement, which might properly be applied to the Slingbox. In addition, this section considers the "fair use" doctrine as it may apply to the Slingbox. Part III considers the jurisdiction of the Federal Communications Commission (hereinafter "FCC") and concludes that the Agency lacks statutory authority to control devices like the Slingbox. It further describes the nature of secondary transmissions and considers whether the Slingbox retransmissions qualify as such.[7] Additionally, this section explains the creation of a compulsory licensing program, which allows infringing secondary transmissions to collect royalties for the copyright owners.[8] Further, this section explores the scope of the FCC's jurisdiction to promulgate the broadcast flag regulation in *American Library Assoc. v. FCC*,[9] and describes the Digital Transition Content Security Act, which would expand the FCC's jurisdiction to control all digital transmission devices.[10] Finally, Part IV proposes a legislative alternative to Congress's current bill that better comports with the underlying purposes of copyright law, while emphasizing the importance of a legislative solution to mitigate the adverse market that may occur while waiting for the judicial process to decide on the issue.

I. UNDERSTANDING TECHNOLOGY

A. Sling Media's Slingbox

In July 2005, Sling Media released the Slingbox, a new media distribution technology.[11] The Slingbox is a small box, about the size of a brick, that connects to the back of a television and "redirects, or 'place-shifts,' the TV signal from

6. 17 U.S.C. § 106 (2005).
7. 17 U.S.C. § 111.
8. *Id.*
9. Am. Library Assoc. v. FCC, 406 F.3d 689, 705 (D.C. Cir. 2005).
10. *See infra* notes 130 and 131.
11. Andrew Wallenstein, *Slingbox Could Spark New Lawsuits*, HOLLYWOOD REPORTER, July 6, 2005, *available at* http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000973572.

[the] cable box, satellite receiver, or digital video recorder (DVR) to [the] computer or laptop of choice" anywhere in the world via a high-speed Internet connection.[12] A virtual remote appears on the screen of the target computer, which allows the user to change the channel of the live broadcast and even allows the user to view recorded programs on the user's DVR at home.[13]

The purpose of the Slingbox is to allow its users to watch any home television program, in real-time, anywhere in the world.[14] The Slingbox seems ideal for individuals who travel often and would like to take their home television subscription with them, as well as for families who have a vacation home and would prefer to pay for the less expensive Internet connection rather than the more expensive cable subscription.[15] The Slingbox is also marketed for use in the user's own home;[16] it is a means of watching the local news while cooking dinner without having to install a television in the kitchen.[17] The Slingbox further appeals to DirecTV® customers who pay per room to receive their programming.[18] With the Slingbox, DirecTV® subscribers could avoid paying for additional rooms by simply viewing their shows on their laptop or computer anywhere in the house.[19]

The retail price of the Slingbox is $249, and, unlike Tivo®,[20] the cost is solely attributed to the sale of the one-and-

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12. Sling Media, Slingbox: What is it?, http://www.slingmedia.com/slingbox/ (last visited Oct. 22, 2005).

13. Sling Media, Slingbox: How it Works, *supra* note 2.

14. *Id.*

15. Comcast, a leading cable television and Internet service provider, rates its most popular cable package for a resident of Pennington, New Jersey at $74.95/month. This package comes with a DVR at an additional $9.95/month and one premium channel, such as HBO or Cinemax. Comcast rates its high-speed Internet at $42.95/month for current cable customers and $57.95 for non-cable customers. With the use of the Slingbox at a location outside of the home, a Comcast cable subscriber can get the Internet and their home cable programming for less than the price of the cable alone (this does not incorporate the retail price of the Slingbox itself). Comcast, Select a Package, http://www.comcast.com/Buyflow/default.ashx.

16. Sling Media, Slingbox: About Sling Media, http://us.slingmedia.com/page/aboutus.html (last visited Jan. 25, 2007).

17. *Id.*

18. DirecTV, How Affordable is it to Get DirecTV Service?, http://www.directv.com/DTVAPP/wizard/buildyoursystem1.jsp (last visited Oct. 22, 2005).

19. Sling Media, Slingbox: About Sling Media, *supra* note 16.

20. Tivo's Service, http://www.tivo.com/2.3.asp (last visited Oct. 22, 2005). Tivo® is a DVR box and service that automatically finds and records the user's designated

a-half pound box, with no monthly service fee or optional one-time service fee.[21] The set-up is simple, so even those who are technologically challenged can enjoy the Slingbox with little hassle.[22] The four-step process consists of connecting the television source to the Slingbox, connecting the Slingbox to a home network router, plugging in the Slingbox's power adapter, and downloading the Slingplayer™ software to the desired computer(s).[23] After this simple set-up, the purchaser can connect to the Internet via a high-speed connection anywhere in the world, access Slingplayer™ using his created password, and watch his own cable television programming on the computer in real-time.[24] Slingplayer™ can be downloaded onto multiple computers; however, a single Slingbox can only be accessed by one computer at a time.[25]

B. Place-Shifting Technology

Slingbox effectively place-shifts the cable broadcast.[26] This is not to be confused with time-shifting, which is what Tivo® and DVRs do.[27] Time-shifting is defined as "the process of recording and storing data for later viewing, listening, or reading."[28] It allows the user to watch a television program at a convenient time for the user by recording the show when it is broadcast and storing it in a Tivo® or DVR for viewing at a later, more suitable time.[29] In the landmark case, *Sony Corp. v. Universal City Studios*, the United States Supreme Court

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programs. It also allows the user to pause and rewind live television. *See generally* http://www.tivo.com/1.0.asp. Tivo's® service can be paid for in one of two ways: (1) $12.95/month, or (2) a one-time product lifetime fee of $299. *See* http://www.tivo.com/1.2.asp.

21. Sling Media, Slingbox Press Release Kit: Datasheet, http://www.slingmedia.com/i/sling_datasheet.pdf (last visited Oct. 22, 2005).

22. Sling Media, Slingbox: How it Works, *supra* note 2.

23. *Id.*

24. *Id.*

25. Mark Spoonauer, *Remote Control: The Simple, But Ingenious Slingbox Plays Live (or Recorded) TV on Your Laptop Wherever You Go*, LAPTOP MAGAZINE, July 12, 2005, *available at* http://laptopmag.com/Review/Sling-Media-Slingbox.htm.

26. Sling Media, Slingbox: What is it?, *supra* note 12.

27. Wikipedia, Time shifting, http://en.wikipedia.org/wiki/Time_shifting (last visited Sept. 8, 2005).

28. Whatis?com, Timeshifting, http://whatis.techtarget.com/definition/0,,sid9_gci1112942,00.html (last visited Sept. 8, 2005).

29. *Id.*

held that such home time-shifting constitutes a fair use[30] and does not infringe on copyright law.[31]

Place-shifting, as it pertains to television, "is a technology that allows anyone with a broadband Internet connection to have video streams from his home television set or personal video recorder forwarded for viewing at any location where he has a computer display and a high-speed Internet connection."[32] Place-shifting, sometimes referred to as space-shifting, has not been ruled on in respect to fair use and copyright infringement, although it has been called a possible fair use.[33] It has also been called the "next media revolution" influenced in great part by factors such as "51% of all U.S. Internet users hav[ing] broadband access, music and video are increasingly digital, and wireless networks are ubiquitous."[34]

The new media technologies of the Slingbox raise the question whether the place-shifting of copyrighted television programming to anywhere in the world constitutes copyright infringement.

II. COPYRIGHT AND PLACE-SHIFTING

A. Bundle of Rights

Copyright law was not developed solely to protect the rights of the authors. It was also designed "upon the ground that the welfare of the public will be served and [the] progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . ."[35] Inherent in copyright law is the need to balance

30. A fair use limits the exclusive rights of copyright owners by allowing certain uses of the copyrighted material based on a specific analysis that considers such factors as the nature of the copyrighted work and the effect of the use upon the potential market. 30. *See generally* 17 U.S.C. § 107 (2005); *see also* discussion *infra* Part II § (d).

31. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454-55 (1984).

32. Whatis?com, Placeshifting, http://whatis.techtarget.com/definition/0,,sid9_gci1112947,00.html (last visited Sept. 8, 2005).

33. *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001).

34. Om Malik, *Home Entertainment to Go*, BUSINESS 2.0, Nov. 17, 2004, *available at* http://wwwbusiness2.com/b2/web/articles/0,17863,782740,00.html.

35. *Sony*, 464 U.S. at 430 (citing H.R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909)).

the rights of the creators and inventors with the interests of the investors, and the wants and needs of the consumers.[36] As technology has advanced, copyright law has grown and adapted in response to the technological developments of the times,[37] while working to maintain balance. With these goals as their guide, Congress created six exclusive rights belonging to the proprietor(s) of the work.[38]

Section 106(4) grants the copyright proprietor the exclusive right to perform audiovisual works publicly.[39] Television programs meet the definition of audiovisual works within the Copyright Act.[40] Clarification of this term in regard to cable systems is addressed in the legislative history, which explains that the concept of public performance extends beyond the isolated acts of performance, but also to the means by which the performance is "transmitted or communicated to the public."[41] The legislative history further notes, as an example, that "a cable television is performing when it

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36. PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 17 (5th ed. 2004).

37. *Id.* at 430.

38. These rights are explicitly stated in Title 17 of the United States Code, Section 106:

> Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies of phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
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> (5) in the case of literary, musical, dramatic, and choreographed works, pantomimes, and pictorial, graphic, or sculpted works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

39. 17 U.S.C. § 106(4).

40. 17 U.S.C. § 101 (2005). Audiovisual works are defined as:

> works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

Id.

41. H.R. REP. NO. 94-1476.

retransmits the broadcast to its subscribers."[42] Therefore, Slingbox is performing when it transmits the cable broadcast to a computer.

However, §106(4) requires the performance to be "public."[43] Under § 101, a performance or display is public if the work is "transmit[ed] or otherwise communicate[d] . . . to a place [open to the public or at any place where a substantial number of persons. . . gather] or to the public, by means of any device or process, whether the members of the public are capable of receiving it."[44] The Slingbox is designed so that only one computer can access it at a time.[45] Thus, it is performing to one computer at a time, and not all computers on the Internet. While many people may be gathered around the receiving computer to meet the public requirement, this will not likely be considered a direct copyright infringement because the Slingbox is capable of substantial non-infringing uses.[46] Furthermore, to find it an infringing product for this purpose alone would not promote technology by deterring inventors from advancing such technologies that might be capable of, though not intended for, copyright infringement purposes.

Section 106(5) grants the copyright proprietor the exclusive right to display his works publicly.[47] The House Report accompanying the statute defines the term "display" as "show[ing] a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process."[48] The Slingbox clearly meets the definition of display; however the display must be public.[49] The same issues applied to § 106(4), likely rendering the Slingbox a non-infringer.

B. Contributory Copyright Infringement

While the Slingbox is not likely a direct copyright infringer, Sling Media, as its manufacturer, may still be a

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42. *Id.*
43. 17 U.S.C. § 106(4).
44. 17 U.S.C. § 101.
45. Spoonauer, *supra* note 25.
46. *See generally Sony*, 464 U.S. 417.
47. 17 U.S.C. § 106(5).
48. H.R. REP. NO. 94-1476.
49. 17 U.S.C. § 106(5).

contributory infringer. To be liable for contributory copyright infringement, one must, "with knowledge of the infringing activity, induce, cause, or materially contribute to the infringing conduct of another."[50] However, a "defendant incurs contributory infringement liability [only] if he has *reason to know* of the third party's direct infringement."[51] Thus, in order to show that Sling Media is contributorily liable for copyright infringement, there must be a strong nexus between Sling Media's sale of the Slingbox and a consumer's actual infringement, based on Sling Media's constructive knowledge of the consumer's illegal act.[52]

C. The Courts on Copyright Infringing Technologies

1. Sony Corp. of Am. v. Universal City Studios, Inc.

In *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)(hereinafter *Sony*), the United States Supreme Court stated "the sale of copying equipment. . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."[53] This principle is called the "staple article of commerce doctrine" and is designed to "strike a balance between a copyright holder's legitimate demand for effective protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."[54] In *Sony*, the Supreme Court ruled that the sale of Sony's Betamax video tape recorders (VTR) did not constitute contributory infringement because they were capable of substantial non-infringing uses.[55] The Betamax VTR allowed consumers to tape their desired programs to watch at a later time, thus introducing time-shifting to television programming.[56] The Court ruled that time-shifting did not render Sony

50. A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000) (citing Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

51. *Id.* at 918 (citing *see* Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990)) (emphasis added).

52. *Sony*, 464 U.S. at 439.

53. *Id.* at 442.

54. *Id.*

55. *See generally Sony*, 464 U.S. 417.

56. *Id.*

contributorily liable because most copyright holders would not object to the mere later viewing of their work.[57] Furthermore, there was no strong nexus between Sony and its customers.[58] "The only contact between Sony and the users of Betamax. . . is at the moment of sale."[59]

Sling Media has placed into the stream of commerce a product that is certainly capable of copyright infringement under certain circumstances. But under *Sony*, as long as it is capable of substantial noninfringing uses, there can be no contributory liability for Sling Media.[60] In addition, like the Betamax, the only connection between the Slingbox and its user is at the point of sale.[61] The issue remains whether or not the courts or Congress should consider place-shifting a means of copyright infringement or a fair use.

2. A & M Records, Inc. v. Napster, Inc.

In *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000)(hereinafter *Napster)*, the United States District Court for the Northern District of California found that Napster was not a staple article of commerce,[62] because Napster, unlike in *Sony*, "exercised ongoing control over its service," allowing users to download copyrighted songs for free from the Internet via a peer-to-peer program in which the user must be signed into the Napster's system of servers in order to access songs to download.[63] The Slingbox requires no such network; rather it requires a broadband connection to the Internet[64] which is not under the control of Sling Media.

Most importantly though, in *Napster*, the court rejected the defense that users are capable of place-shifting their music through Napster, thus constituting a noninfringing use and trumping contributory liability.[65] While Napster argued that place-shifting is virtually the same thing as time-shifting and is therefore a fair use under copyright law, the court

57. *Id.*
58. *See generally Sony*, 464 U.S. 417.
59. *Id.*
60. *Id.*
61. *Sony*, 464 U.S. at 437; *see also* Spoonauer, *supra* note 25.
62. *A & M Records*, 114 F. Supp. 2d at 916.
63. *Id.* at 916-17.
64. Sling Media, Slingbox: What is it?, *supra* note 12.
65. *A & M Records*, 114 F. Supp. 2d at 915-16.

refused to rule on the matter, concluding that any place-shifting done by Napster users was minimal and thus fell short of satisfying the staple article of commerce defense.[66]

3. MGM Studios, Inc. v. Grokster, Inc.

In *MGM Studios, Inc. v. Grokster, Inc.*, 545 U.S. 913 (2005)(hereinafter *Grokster*), the United States Supreme Court held that even if an article of commerce is capable of substantial noninfringing uses, its maker may still be found liable for contributory infringement if it promotes the product as one whose principal use is for copyright infringement.[67] In *Grokster*, the defendant Internet software companies were found to have purposely marketed themselves to former Napster users and that the primary use of their product was to infringe on such copyrights as Napster did, although both products were capable of substantial noninfringing uses.[68]

Sling Media has not promoted the Slingbox as a product that fosters copyright infringement.[69] Only one computer is capable of accessing it at a time and may only do so with the owner's personally-created password,[70] shifting the responsibility of who is viewing the retransmission into the hands of the owner. In addition, the Slingbox offers no means of recording the programs,[71] although the Slingbox is capable of allowing a user to view a program that has previously been recorded by a DVR or Tivo®.[72] These are justifiable methods of averting contributory copyright infringement charges.

However, in a review of the Slingbox, one critic wrote that its ability to only be accessed by one computer at a time is an actual drawback of the product,[73] suggesting that the Slingbox should be able to be accessed by as many people as possible, which would certainly add to copyright infringement

66. *Id.*

67. MGM Studios Inc., v. Grokster, Inc., 545 U.S. 913, 941 (2005).

68. *Id.* at 916.

69. Sling Media, Slingbox: About Sling Media, *supra* note 16.

70. Spoonauer, *supra* note 25.

71. Randy Picker, *Picker: Copyright and Product Design*, Picker Mobblog, July 1, 2005, *available at* http://picker.typepad.com/picker_mobblog/2005/07/index.html.

72. Sling Media, Slingbox: How it Works, *supra* note 2.

73. "Another drawback [of the Slingbox] is that more than one person cannot access the Slingbox at the same time, which is a shame since you can load Sling Media's software on multiple personal computers. If you can learn to share, the other user can watch when you're finished by entering a password." Spoonauer, *supra* note 25.

issues. Although it is possible that users may be able to hack into the Slingbox and make it capable of being accessed by more than one viewer, or simply share his password with others, Sling Media has not marketed itself as a product which can abuse the copyright infringement laws.[74] Rather, Sling Media has taken precautionary steps to prevent liability as well as infringement by others and thus is unlikely be held liable under the *Grokster* rule.

D. Fair Use

Despite a lack of current legislation that is directly applicable to the Slingbox or any case law stating that products like the Slingbox infringe on copyright, place-shifting may remain problematic. Assuming that the use would otherwise be infringing, the question remains whether place-shifting is a fair use under § 107 of the Copyright Act of 1976. In a proper fair use analysis, the Slingbox is likely to be considered an unfair use of copyright work, rendering it a copyright infringer.

Section 107 states that "the fair use of a copyrighted work. . ., for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement on copyright."[75] The purpose of the Slingbox does not appear to be specifically for any of these suggested uses, but that does not mean it is not a fair use. The legislative history of the Copyright Act states that there "is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[76] This means that "Congress intended that the fair use doctrine be flexible enough to protect new technologies as uses of copyrighted works,"[77] although the uses should be productive and beneficial in their nature.

Section 107 presents a four-prong test of factors to be used in determining whether a use constitutes a fair use:

> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit purposes;
>
> (2) The nature of the copyrighted work;

74. Sling Media, Slingbox: About Sling Media, *supra* note 16.
75. 17 U.S.C. § 107.
76. H.R. REP. 1476, 94th Cong. 2d Sess. at 96 (1976).
77. 137 CONG. REC. S. 14352, Oct. 3, 1991.

> (3) The amount and substantiality of the portion used in relation to the copyrighted works as a whole; and
>
> (4) The effect of the use upon the potential market for or value of the copyrighted work.[78]

The legislative history states that "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[79] Thus, a full fair use analysis of the Slingbox is necessary.

Considering the first prong, the purpose and character of the Slingbox's use is certainly not commercial in nature from the user's perspective. The product is bought for its use and convenience; the user reaps no monetary benefit. Its character is that of a one time purchase machine with a desirable function. There are no service fees since no service is being performed.[80]

The second prong looks at the nature of the copyrighted work, which is audiovisual. These audiovisual programs are creative in nature, like the musical compositions and sound recordings in *Napster*.[81] "They constitute entertainment, which cuts against a finding of fair use under the second factor."[82] In addition, any and all television programs broadcast to the user's home are capable of being place-shifted via the Slingbox, from basic network cable to super-stations and cable subscription channels such as HBO and Cinemax. Disparities among the broadcast channels with a place-shifting system that provides no regulations or restrictions regarding what may or may not be retransmitted, weighs in favor of infringement.[83]

The third prong is easily addressed; entire copyrighted works are being place-shifted. There are no limitations on the portions of works that can be viewed via the Slingbox; this is left to the user's discretion. This seems to be another shift away from a fair use defense.

Regarding the fourth and very important prong, the effect on the potential market for the copyrighted work has yet to be

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78. 17 U.S.C. § 107.
79. H.R. REP. NO. 94-1476.
80. Sling Media, Slingbox: About Sling Media, *supra* note 16.
81. *A & M Records*,114 F. Supp. 2d at 913.
82. *Id.*
83. *See infra* Part III § (a).

seen. However, the Slingbox and other products like it have the potential to be significant. Families with summer homes and winter getaways no longer have to pay for more than one cable service, which decreases the amount of royalties paid to the copyright owners through the compulsory license program[84] while increasing the amount of viewing. Siblings who live in different parts of the world may now share an HBO subscription.[85] In addition, major sports leagues that control the broadcasts of games, for instance, the National Football League (hereinafter "NFL"), may be injured. "Place-shifting is problematic to many copyright holders because it sidesteps 'proximity control', which restricts the distribution of content to specific regions and times."[86] Cable and satellite providers, for example, the NFL and DirecTV's Sunday Ticket,[87] offer promotions which will be worthless if such sports leagues lose their proximity control when place-shifting allows local games to be viewed outside of the controlled area. A Washington Redskins fan who lives in California is less likely to purchase Sunday Ticket every season when his best friend lives in Washington D.C. and owns a Slingbox.

In support of the argument that place-shifting is a fair use, it may be contended that since the user has already paid for the cable, which has paid the royalties to the copyright proprietors for the broadcast, the user should be able to view what she has already paid for anywhere she wants. This is because it is the nature of cable and satellite broadcasts to be paid for by location. If a product makes it possible for a subscribed cable broadcast to be available in more than one location, the copyright proprietors have lost their basis for collecting royalties. Two subscriptions have merged into one, which means there will be only one broadcast of the copyrighted work, rather than the original two, thus halving the royalties paid to the copyright proprietor. This negates

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84. *Id.*

85. Whether such sharing constitutes cable fraud is not an issue that will be addressed here, but certainly one worth noting.

86. Wallenstein, *supra* note 11.

87. NFL Sunday Ticket™ is a special offer from DirecTV that provides the subscriber with a television broadcast of every football game in a season as well as additional football related special features. The NFL and DirecTV had to unite to create this offer since the NFL owns the copyrights to the broadcast of the games. *See generally* DirecTV Sports, NFL Sunday Ticket, http://www.directvsports.com/Subscriptions/NFLSundayTicket/.

the underlying principals of copyright law by undermining its purpose of encouraging authorship.

In recognition of the arguments in favor of place-shifting as a fair use, the analysis continues to weigh heavily against such a ruling. Furthermore, in *Sony*, the Supreme Court interpreted the fair use doctrine to mean that courts should not "inhibit access to ideas without any countervailing benefit."[88] It seems unlikely that a court would favor a consumer's convenience over a copyright proprietor's exclusive rights. Thus, the Slingbox as a means of place-shifting cable broadcasts by retransmitting them over the Internet[89] seems likely to infringe on copyright.

III. THE FCC'S ROLE

A. Federal Communications Commission

The Federal Communications Commission (hereinafter "FCC") regulates and governs "interstate and international communications by radio, television, wire, satellite and cable."[90] This agency was granted "authority over cable systems to assure the preservation of local broadcast service and to effect an equitable distribution of broadcast services among the various regions of the country."[91] However, the FCC currently has no authority to regulate devices like the Slingbox that use place-shifting to retransmit cable programs.

The FCC has developed three definitions pertinent in determining the extent of its governing authority. The first is cable service, which "is the transmission to subscribers of video programming or other programming service. . . includ[ing] any subscriber selection requiring choosing video programming or other programming service."[92] Although the Slingbox provides a means to transmit the user's programming to his computer,[93] Sling Media has no

88. *Sony*, 464 U.S. at 450-51.

89. Sling Media, Slingbox: How it Works, *supra* note 2.

90. FCC, About the FCC, http://www.fcc.gov/aboutus.html (last visited Jan. 10, 2006).

91. FCC, Fact Sheet, Cable Television, http://www.fcc.gov/mb/facts/csgen.html (last visited Jan. 10, 2006).

92. *Id.*

93. Sling Media, Slingbox: What is It?, *supra* note 12.

subscribers.[94] The one time purchase of the Slingbox keeps Sling Media from performing a service; it merely produces the product.[95] In addition, the Slingbox "redirects," or retransmits, the programming.[96] The definition refers only to transmissions, and does not specifically address *re*transmissions.[97] Without specific reference to retransmissions, the Slingbox cannot fall under this definition as a cable service, regardless of the subscriber element.

Second, a cable system is "a facility, consisting of a set of closed transmission paths and provides cable service which includes video programming and which is provided to multiple subscribers within a community."[98] Without satisfying the cable service definition, the Slingbox cannot satisfy the elements needed to qualify as a cable system. This definition also calls for subscribers[99] which, again, Sling Media does not have.[100]

The third is a cable television operator. This is defined as "any person or group of persons who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or who otherwise controls or is responsible for, through any arrangement and operation of such a cable system."[101] Neither Sling Media nor the Slingbox itself provides "cable service over a cable system;"[102] it merely provides the box that retransmits the programming previously received from the user's cable service provider,[103] and therefore fails to meet the definition of a cable television operator.

Sling Media and the Slingbox's failure to meet any of these definitions renders the FCC with no direct authority, as granted by Congress pursuant to its control over cable systems,[104] over such place-shifting technologies.

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94. Sling Media, Slingbox Press Release Kit: Datasheet, *supra* note 21.
95. *Id.*
96. Sling Media, Slingbox: What is it?, *supra* note 12.
97. FCC, Fact Sheet, Cable Television, *supra* note 92.
98. *Id.*
99. *Id.*
100. Sling Media, Slingbox Press Release Kit: Datasheet, *supra* note 21.
101. FCC, Fact Sheet, Cable Television, *supra* note 92.
102. *Id.*
103. Sling Media, Slingbox: What is It?, *supra* note 12.
104. FCC, Fact Sheet, Cable Television, *supra* note 92.

B. Secondary Transmissions

The FCC also regulates the authorized secondary transmissions that are governed by §111 of the Copyright Act.[105] This section allows certain secondary transmissions to occur without infringement liability.[106] The statute defines a secondary transmission as "the further transmitting of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the forty-eight contiguous states."[107] Subscribers are also required by this section's definition of cable system,[108] rendering §111 inapplicable to Sling Media and the Slingbox.[109] In addition, because the Slingbox is a compact and transportable device,[110] its location is indeterminable and cannot be said to be "within the forty-eight contiguous states."[111]

Under §111, secondary transmissions are permitted if "made by a carrier who has no. . . control over the content . . . of the primary transmission or the recipients of the secondary transmission, and whose activities. . . consist solely of providing wires, cables, or other communication channels for the use of others." [112] Sling Media could argue that it is entitled to market its product because it has no control over secondary transmissions or the recipients of those transmissions, and that the Slingbox itself is merely a telecommunications device allowing the secondary transmission.[113] However, this argument is likely to fail because the nature of telecommunications requires a service, not just a device;[114] in the case of the Slingbox, the Internet

105. *See generally* 17 U.S.C. § 111.
106. *Id.*
107. 17 U.S.C. § 111(f).
108. *Id.*
109. FCC, Fact Sheet, Cable Television, *supra* note 92.
110. Sling Media, Slingbox Press Release Kit: Datasheet, *supra* note 21.
111. 17 U.S.C. § 111(f).
112. 17 U.S.C. § 111(a)(3).
113. Should this argument be persuasive, it would indemnify Sling Media by defining the secondary transmission as non-infringing. 17 U.S.C. § 111(a)(3).
114. Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as it is sent." 47 U.S.C. § 153(43). Telecommunications service means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of

may qualify as a service.[115] Therefore, Sling Media cannot claim that the Slingbox has immunity under §111 as such a carrier because it does not meet the definition of cable system or the definition of a telecommunications service.

C. Compulsory License Program

Section 111 of the Copyright Act also creates a compulsory licensing program for secondary transmissions, which is governed by the rules and regulations of the FCC and applies to both cable systems and, more recently, satellite carriers.[116] This program enables cable operators to retransmit certain signals to their subscribers without having to obtain the copyright owners' direct authorization.[117] Rather, the cable operators pay a set fee for this right, and the royalties collected are distributed to the copyright proprietors through the compulsory licensing program.[118]

However, the compulsory license program is limited to protect the copyright proprietor from transmissions into markets that, without due royalties, would injure the copyright proprietor.[119] The statute states that "the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming."[120] Thus, cable systems must pay royalties for the retransmission of distant non-network programming or face liability for copyright infringement.[121]

The Slingbox is capable of retransmitting distant non-network programming to anywhere in the world without comporting with the compulsory licensing program because it fails to meet the FCC's definition of cable system. Therefore,

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the facilities used." 47 U.S.C. § 153(46).

115. Sling Media, Slingbox: How it Works, *supra* note 2.

116. *See generally* 17 U.S.C. §§ 119 and 122 (2005).

117. 145 CONG. REC. E. 245 (1999). This program enables the "rebroadcast [of] network and superstation signals to cable television viewers without requiring cable operators to receive the authorization of thousands of copyright owners who have an exclusive right to authorize the exploitation of their programs. The cable operators pay a set fee for the right to retransmit and the monies collected are paid to the copyright owners through a distribution proceeding conducted under the auspices of the United States Copyright Office." 145 CONG. REC. E. 245 (1999).

118. *Id.*

119. 17 U.S.C. § 111(d)(3)(A).

120. H.R. REP. NO. 94-1476

121. *Id.*

while a cable system is required to comport with the compulsory license program to prevent infringement liability, it appears that the Slingbox can perform a copyright infringing retransmission and escape liability.

D. Broadcast Flag Regulations

The FCC's limited jurisdiction also prevents it from regulating the use of the Slingbox. In *American Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), the United States Court of Appeals for the District of Columbia ruled that "the FCC has no congressionally delegated authority to regulate receiver apparatus after a transmission is complete."[122] In this case, the FCC had adopted the broadcast flag regulation which was designed to prevent digital retransmission of broadcasts as technological advancements moved from analog cable to digital cable.[123] The broadcast flag regulations required "that digital television receivers and other devices capable of receiving digital television broadcast signals, manufactured on or after July 1, 2005, include technology allowing them to recognize the broadcast flag."[124] The issue at hand was whether the FCC has the jurisdiction to control the apparatus after the transmission is received. The court in *American Library Assoc.* found that the Communications Act does not grant the FCC the power to control the device used to receive the transmission; it merely controls the receipt of the service. [125]

The Slingbox's retransmission of the cable broadcast occurs after the transmission is complete[126] and is therefore outside the FCC's jurisdiction.[127] Even if the FCC wished to force such place-shifting technologies to comport with the

122. *Am. Library Assoc.*, 406 F.3d at 705.

123. *See generally Am. Library Assoc.*, 406 F.3d at 692-96.

124. *Am. Library Assoc.*, 406 F.3d at 691.

125. *Id.* at 698. The broadcast flag does not dictate how [digital television] transmissions are made, but simply controls how the transmitted content can be treated after it is received... The Communications Act is clear that... it gives the FCC authority over receipt of 'services,' not the receipt 'apparatuses' the agency now attempts to regulate. *Id.*

126. Sling Media, Slingbox: How it Works, *supra* note 2. The cable broadcast is received by the home cable box which is where the FCC's jurisdiction ends. It is only after this point that the broadcast is retransmitted by the Slingbox via the Internet to the computer. *Id.*

127. *See generally Am. Library Assoc.*, 406 F.3d 689.

compulsory licensing program, it lacks the power to do so.[128]

E. The Digital Transition Content Security Act

The Digital Transition Content Security Act (hereinafter DTCSA) was introduced to the House of Representatives by Republican Representative James Sensenbrenner, Jr. of Wisconsin on December 16, 2005.[129] This bill proposed to "require certain analog conversion devices to preserve digital content security measures, essentially implementing the broadcast flag rule through legislation by expanding the scope of the FCC's jurisdiction as a means of controlling copyright infringing digital retransmissions.[130]

The DTCSA was supported by Dan Glickman, Chairman and CEO of the Motion Picture Association of America (hereinafter "MPAA"), as well as Mitch Bainwol, the Chairman and CEO of the Recording Industry Association of America (hereinafter "RIAA").[131] While Glickman referred to the bill as a "very important piece of legislation that will

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128. *Id.*

129. Digital Transition Content Security Act, H.R. 4569, 109th Cong. (2005). *See generally* Wikipedia, The Digital Transition Content Security Act, http://en.wikipedia.org/wiki/Digital_Transition_Content_Security_Act#Advocates (last visited Jan. 9, 2006).

130. The Broadcast Flag Legislation Discussion Draft 11/03/05 § 101(a)(x): "The FCC shall have authority with respect to digital television receivers to adopt such additional regulations and certifications as are necessary, with the purpose of implementing the Report and Order in the matter of Digital Broadcast Content Protect, FCC 03-273, which was adopted by the Commission on November 4, 2003 effective January 20, 2004."
See http://weblog.ipcentral.info/Broadcast%20Flag%20Discussion%20Draft.pdf. *See also* DTCSA, H.R. 4569, 109th Cong. §101(a)(1): "No person shall manufacture, import, offer to the public, provide or otherwise traffic in any – analog video input device that converts into digital form an analog video signal that is received in a covered format, or an analog video signal in a covered format that is read from a recording on an inserted storage medium, unless any portions of such device that are designed to access, record or pass the content of the analog video signal within that device: (i) detect and respond to the rights signaling system with respect to a particular work by conforming the copying and redistributing of such work to the information contained in the rights signaling system for such work in accordance with the compliance rules set forth in section 201 and the robustness rules referred to in section 202; and (ii) pass through or properly reinsert and update the CGMS-A portion of the rights signaling system or coding and data pertaining to CGMS-A and pass through the VEIL portion of the rights signaling system in conformance with such compliance rules and robustness rules." DTCSA, H.R. 4569, 109th Cong. §101(a)(1).

131. Grammy.com, Artswatch,
http://www.grammy.com/news/artswatch/2005/1114eff.aspx (last visited Jan. 9, 2006).

promote more consumer choice as it protects copyright owners in the digital age,"[132] many critics claim it will do more damage than good.

One such critic is Gigi Sohn, the president of Public Knowledge, a "nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law."[133] Sohn testified before the House Judiciary Committee in November of 2005 and addressed the major consequences of its implementation, including the expansion of the FCC's authority.[134] Sohn argued that the broadcast flag rule is too broad and gives the FCC too much power.[135] If passed, the bill would impose specifications on all digital devices, including cell phones, Nintendo GameBoys, Sony PSPs, palm pilots, and the like; further, the rule is not specific to DVRs and place-shifting devices.[136] Sohn expressed her concern that the FCC would essentially be "making copyright law and policy" which should be Congress's task, not the FCC's.[137]

IV. PROPOSED LEGISLATION

Enacting legislation that would implement copyright protection against place-shifting technologies is essential to the television market and industry. Waiting for a judicial response to this issue would take too long, and the market is not likely to resolve the issue itself, as seen with the effects of new technologies and the music and film industries.[138] The Slingbox is unlikely exempt from infringement liability as a

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132. Wikipedia, The Digital Transition Content Security Act, *supra* note 129.

133. Public Knowledge, PK's Testimony on the Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole, http://www.publicknowledge.org/news/testimony/20051103-gbsohn-testimony (last visited Jan. 9, 2006).

134. *Id.*

135. Public Knowledge, Seven Facts About the Broadcast Flag, http://www.publicknowledge.org/issues/bf7pts (last visited Jan. 9, 2006).

136. *Id.*

137. Public Knowledge, PK's Testimony on the Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole, *supra* note 134.

138. The introduction of digital music and the Internet, which led to file sharing and downloads, greatly affected the music industry, resulting in decreased sales and revenues for record labels and artists alike. The Internet has also been a major player in the ongoing battle against piracy in the film industry, as Hollywood films and independent films are made available to download freely.

telecommunications service.[139] The compulsory licensing program does not extend to it and yet the Slingbox is capable of retransmitting distant non-network programming, an act for which the FCC requires cable systems to pay royalties.[140] Furthermore, it does not fall under the FCC's jurisdiction because it fails to meet the elements of the definitions of cable systems and services, [141] so the FCC cannot legally require Sling Media to comport with the compulsory licensing program.[142]

Congress should not implement the DTCSA, or any proposed bill of a similar nature. As Sohn argued,[143] it is over broad and extends the FCC reach too far. While this act seeks to prevent copyright infringement, it also prevents consumers from being able to implement the fair uses of the affected digital devices.[144] This offsets the balance of copyright protection by putting too much weight on preventing infringement, which effectively diminishes the incentive to create new technologies and fails to satisfy the needs and wants of the consumers.

To conclude that place-shifting technologies infringe on copyright by retransmitting protected cable broadcasts and should therefore be wholly disallowed, as the DTCSA asserts, would contradict the purpose of the copyright which it is alleged to infringe upon. Inventors would be discouraged from moving-forward in discovering the capabilities of digital technologies. Investors would have few innovative technologies to endorse. Most importantly, consumers would be deprived of the convenience and pleasure of enjoying such technological advancements.

Instead, Congress should amend the Copyright Act, just as it did with satellite receivers,[145] and require the manufacturers of place-shifting technologies to comport with

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139. *See generally* 47 U.S.C. § 153.

140. *See generally* 17 U.S.C. § 111.

141. FCC, Fact Sheet, Cable Television, *supra* note 92.

142. 17 U.S.C. § 111.

143. Public Knowledge: PK's Testimony on the Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole, *supra* note 134.

144. *Id.* For example, as the D.C. Circuit noted in *Am. Library Assoc. v. FCC*, the broadcast flag would limit the ability of libraries and other educators to use broadcast clips for distance learning via the Internet that is permitted pursuant to the TEACH Act, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, amending 17 U.S.C. §§ 110, 112 & 882 (2002). *Id.*

145. *See generally* 17 U.S.C. §§ 119 and 122.

the compulsory licensing program. The Copyright Act has historically grown with technology in order to ensure that the underlying purposes of such protection are not undermined.[146] The Copyright Act seeks "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[147] To deny such advancements in technology would defeat this purpose. A balance is needed between the promotion of such technological advancements and their uses, which have the potential of enhancing the everyday lives of consumers, and protecting those whose works are affected by those advancements in technology.[148] A bill proposing to create this balance should include:

> i) a mandate requiring place-shifting technological devices to be sold as a service;
>
> ii) the service provider must be required to keep a record of the programs being retransmitted and to deliver this record to the appropriate royalty collector;
>
> iii) the Copyright Act should be amended to:
>
> > (1) apply a compulsory license, to be regulated by the FCC, to specific types of programs that are being retransmitted, including distant non-network programming;
> >
> > (2) determine what fair and just royalty rate should be applied to the retransmitted programming; and
> >
> > (3) create a means of collecting the royalties from the place-shifting service provider and distributing the royalties due to the appropriate copyright proprietors.

In *Sony,* before the United States Supreme Court overturned the lower court's decision, the Court of Appeals ruled that the Betamax was "not a fair use because it was not a 'productive use.'"[149] The Court of Appeals "suggested that a continuing royalty pursuant to a judicially created compulsory license may very well be an acceptable resolution of the relief

146. *Sony,* 464 U.S. at 430.
147. U.S. CONST. art. I, § 8, Cl. 8.
148. GOLDSTEIN, *supra* note 37, at 17.
149. *Sony,* 464 U.S. at 427.

issue."[150] Although the Circuit Court's holding was overturned, Congress should adopt its suggested remedy and apply it to the Slingbox. Implementing the compulsory licensing program requiring the manufacturers of such place-shifting media technologies to pay royalties to the copyright proprietor, with respect to the number of subscribers and the amount of distant non-network secondary transmissions occurring,[151] has the potential to create such a balance.

While such legislation does away with the simplicity of the Slingbox and requires that Sling Media provide a service, likely to be accompanied with a monthly service fee,[152] it also creates a bigger market for manufacturers like Sling Media. The technology would be improved so that every time the user logs into the Slingbox from his or her computer, the Slingbox, which is already connected to the Internet, can automatically connect to Sling Media's database, which would monitor what programs are being retransmitted. The database would record anonymously what distant non-network programming was retransmitted and the royalties can be determined according to that information.

In addition, the manufacturers now have the option of providing the service themselves and making a greater profit than from merely selling the merchandise. In the alternative, they also have the option of bargaining with cable providers who possibly have a better means of providing such a service but lack the advanced technology. For example, Sling Media could strike a deal with Comcast, a leading cable television and Internet service provider to allow only Comcast subscribers to purchase the Slingbox, making Comcast the sole provider of the unique service available through the Slingbox. Comcast would benefit in the form of more subscribers who want the Slingbox technology and service and Sling Media can benefit by selling the Slingbox to Comcast at a higher rate or perhaps at the wholesale rate, but reap the benefits of a percentage of a service fee paid by subscribers. In such a case as this, Comcast, as the actual service provider, would be subject to the compulsory license.

Congress must consider two questions when enacting a

150. *Id.* at 428.

151. 17 U.S.C. § 111.

152. Such as Tivo's. Tivo's Service, http://www.tivo.com/2.3.asp (last visited Oct. 22, 2005).

copyright law: "(1) how much will the legislation stimulate the [copyright owner] and so benefit the public; and (2) how much will the monopoly granted be detrimental to the public?"[153] While the proposed legislation is not the easiest to implement and demands more from manufacturers than they had perhaps intended, it maintains an efficient balance between the creators, consumers, and investors that the DTCSA lacks.[154] Further, the proposed legislation encourages the manufacturer to continue to study technology and seek to further its advance, without fear of facing a copyright infringement suit. The manufacturers' goals can continue to focus on improving and upgrading the technology, rather than searching for legal holes in attempts to avoid litigation. The public is benefited by being able to use the new media technology. Members of the public can use the place-shifting technology to view their television programming anywhere in the world without an impending fear of investing in a product that may one day be rendered a copyright infringement by a court. The benefits to the public outweigh any temporary monopoly Sling Media may hold until another manufacturer markets a similar, but more advanced or less expensive, product. The answers to both questions suggest that the proposed legislation would create a positive impact on the manufacturer, the public, as well as the advancements in technology.

CONCLUSION

As it stands today, copyright law is insufficient and cannot wait on a judicial decision to become efficient. Technology is advancing and the law has failed to keep up. It is essential to the development of today's society to maintain steady growth and progress in technology. Devices that are capable of copyright infringement will continue to be developed. It is therefore essential that copyright law continue to keep pace with these developments without preventing them.

Congress should avoid legislation similar to the DTCSA that would grant the FCC broad authority over copyright control, authority that should be retained by congressional representatives. Rather, it should enact legislation that

153. *Sony*, 464 U.S. at 430.

154. *See supra* notes 130 and 131.

satisfies the purpose of the Copyright Act and maintains a balance between the protection of copyrighted works and incentives for artists and inventors to create original works in new and advanced technologies. The proposed legislation in this paper maintains this necessary balance, while justly and effectively providing due royalties to copyright proprietors.